WONG NAM LOI

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CRIMINAL APPEAL NO: P 05-86-94]
13 SEPTEMBER 1997

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Possession, presumption of - Knowledge of drugs - Whether essential - Custody and control - Whether sufficient*

The appellant was convicted of trafficking in 20,269.5g of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and was sentenced to death. At the material time of his arrest at a police road-block, the appellant was the driver and sole occupant of the motor vehicle which was transporting a refrigerator in which the heroin was found by the police. The sum total of the appellant's defence was that he had absolutely no knowledge of the contents of the refrigerator, ie, that he was an innocent carrier.

Held:
Per Shaik Daud Ismail JCA

[1] In respect of the 'presumption of possession' it was incumbent on the prosecution to prove that the appellant had knowledge of the heroin in the refrigerator. Proof of such knowledge was essential; the mere proof of custody and control would be insufficient.

[1a] It is clear that there cannot be possession without knowledge. The word "possession" implies full or exact knowledge.

[2] The trial judge was correct in coming to the conclusion that the appellant had knowledge of the heroin in the refrigerator. Firstly, the appellant's conduct at the time of his arrest was inconsistent with his assertion that he had no knowledge of the heroin; secondly, the appellant's incriminating utterances and gestures immediately after his arrest were correctly admitted under s. 27 of the Evidence Act 1950; and thirdly, the appellant's other incriminating oral statements were voluntarily made and were correctly admitted under s. 37A of the DDA.

[Appeal dismissed; conviction and sentence confirmed.]

UNDANG-UNDANG JENAYAH: *Akta Dadah Berbahaya 1952 - Seksyen 39B(1)(a) - Pemilikan, tanggapan - Pengetahuan mengenai dadah - Samada penting - Jagaan dan kawalan - Samada memadai*

Perayu telah disabitkan atas kesalahan mengedar 20,269.5g dadah jenis heroin di bawah s. 39B(1)(a) Akta Dadah berbahaya 1952 ('DDA') dan telah dijatuhkan hukuman mati. Pada waktu material ketika penangkapan beliau di satu sekatan jalan polis, perayu merupakan pemandu dan penumpang tunggal kenderaan bermotor yang sedang mengangkut sebuah peti sejuk di mana dadah heroin itu dijumpai oleh polis. Kesimpulan pembelaan perayu adalah bahawa beliau telah secara mutlaknya tidak mengetahui akan kandungan peti sejuk tersebut, iaitu, bahawa beliau merupakan pembawa yang tidak bersalah.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Berhubung dengan "tanggapan pemilikan" ianya adalah berkewajipan ke atas pihak pendakwaan untuk membuktikan bahawa perayu mengetahui akan dadah heroin itu yang berada dalam peti sejuk tersebut. Bukti pengetahuan yang sedemikian adalah penting; bukti penjagaan dan kawalan semata-mata adalah tidak memadai.

[1a] Adalah jelas tidak mungkin terdapatnya pemilikian tanpa pengetahuan. Perkataan "pemilikan" menandakan pengetahuan sepenuhnya atau pengetahuan yang tepat.

[2] Hakim perbicaraan betul dalam mencapai keputusan bahawa perayu mengetahui akan heroin yang berada dalam peti sejuk tersebut. Pertamanya, kelakuan perayu pada waktu beliau ditahan adalah tak konsisten dengan penegasan beliau bahawa beliau tidak mengetahui mengenai heroin tersebut; keduanya, kata-kata dan kelakuan perayu yang memberatkan sejurus selepas penahanannya telah secara betulnya diakui di bawah s. 27 Akta Keterangan 1950; dan ketiganya, pernyataan lisan perayu yang melibatkannya telah dibuat dengan sukarela dan telah secara betulnya diakui di bawah s. 37A DDA.

[Rayuan ditolak; sabitan dan hukuman disahkan.]

Case referred to:
Leow Nghee Lim v. Rex [1956] 22 MLJ 128 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37A, 39B(1)(a), (2)
Evidence Act 1950, s. 27

[Appeal from High Court Malaya, Pulau Pinang; Criminal Case No: 47-26-90]

For the appellant - Ahmad Johari Hamzah; M/s AJ Hamzah & Co
For the respondent - Azahar Mohamed, DPP

JUDGMENT

Shaik Daud Ismail JCA:

The appellant was convicted by the Penang High Court for an offence of trafficking in 20,269.5 grams of heroin alleged to have been committed on 28 July 1989 in front of the Nibong Tebal Police Station, an offence under s. 39B(1)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952, (Act). He was accordingly sentenced to death.

The facts leading to the arrest of the appellant are not in dispute and they are that at 6.50 am on 28 July 1989 the appellant was seen driving a motor van bearing registration number BCR 7161 along the main trunk road from Butterworth to Nibong Tebal. It so happened that at about that time the police had put up a road block in front of the Nibong Tebal Police Station and when the appellant arrived at the said road block, he was stopped. On examination of the van the police found a twin door refrigerator lying on its side behind the driver's seat. In the glove compartment was also found the appellant's international passport, driving licence, Public Services Vehicle licence badge, income tax assessment notice and two receipts issued by the London Hotel in Penang.

When the refrigerator was examined by the police, they found inside, four plastic bags containing a total of eighty blocks of white substance wrapped in plastic sheets, believed to be heroin and indeed confirmed by the government chemist to be heroin weighing 20,269.5 grams. The appellant was the driver and sole occupant of the van transporting the refrigerator in which the police recovered the heroin.

The appellant in his defence on oath testified that he was a businessman dealing in plastic bags prior to 28 July 1989. On 4 July 1989 he went to Padang Besar, near the Perlis Thai border where he met a friend simply known to him as "Lim". Apparently this Lim requested him to take a refrigerator and a slot machine to Kuala Lumpur, which request he casually agreed. He then parked the van in the compound of a mosque in Padang Besar, and proceeded to Thailand by taxi. He claimed that between 21 July 1989 and 25 July 1989 he was in Haadyai Thailand, where he purchased some Korean ginseng and two deer penises. He returned to Padang Besar, took his van and drove it to a spot in front of the Padang Besar Taxi Stand, commonly used by him and other traders. There he met Lim again and once more Lim repeated his request about the refrigerator and slot machine to be delivered to Kim Mun Used Car in Kuala Lumpur.

The appellant agreed and soon after Lim and two others brought a refrigerator and a slot machine. The appellant said that as he was busy trading, he handed over the van keys to Lim who loaded the refrigerator and the slot machine. The appellant said that the refrigerator doors were shut and a string was tied around it. The appellant said that he had known Lim for eight years and had no reason to suspect anything and as such he did not inspect the refrigerator. At about 6 pm on 25 July 1989 he left Padang Besar for Penang and arrived in Penang at 9 pm the same night. That night, the appellant testified that he slept in the van but for the next two nights he slept at a hotel called London Hotel in Georgetown, hence the receipt from the hotel. He did not, however, explain why he slept in the van the first night. At 5.30 am on 28 July 1989, he left Penang for Kuala Lumpur where he was stopped and detained at the road block at Nibong Tebal. He testified that he only knew that the refrigerator contained "something" when it was being unloaded from the van when the refrigerator door opened and "something" fell out. He was asked by one of the police officers what it was and he replied that he did not know. The sum total of the appellant's defence is that he had no knowledge whatsoever of the contents of the refrigerator. In other words his defence is that he was an innocent carrier of the refrigerator which in fact belonged to Lim, and furthermore he himself did not load it into his van but Lim did.

Whilst the prosecution had succeeded in proving the appellant had custody and control of the refrigerator, for the presumption of possession of the heroin concerned, it is also encumbent on the prosecution to prove that the appellant had knowledge that the drugs were in the refrigerator. Without proof of knowledge or to impute such knowledge to the appellant, mere proof of custody and control is insufficient. In *Leow Nghee Lim v. Rex* [1956] 22 MLJ 128, a case of possession of opium Taylor J expounded and discussed the word "possession". At p. 30 of his judgment he said:

> A man must know of the existence of a chattel and have some idea of its whereabout before he can exercise any control over it. The word possession therefore implies full or exact knowledge.

Therefore, it seems clear that without knowledge there cannot be possession. In most cases knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances. The learned trial judge came to the conclusion that the appellant had knowledge of the contents of the refrigerator based on the following surrounding circumstances and facts adduced at the trial. Firstly, the appellant's behaviour during the search of the refrigerator in his presence at the Ibu Pejabat Daerah Nibong Tebal (IPD), when the blocks of white substances were seen, the appellant remained silent. He made no protest nor exhibited any conduct consistent with his lack of knowledge of the substances.

Secondly, the appellant's conduct in pointing to the refrigerator (P22) with his handcuffed hands and uttering certain words to the effect that if there is anything illegal it is in the refrigerator. These words were uttered after Inspector Shahrul Anuar bin Md. Idris (SP7) questioned the appellant as to where the illegal stuff was. The learned judge did not mention under what provisions of the law he admitted the oral statement including the pointing towards the refrigerator. Since the appellant had already been arrested and handcuffed and since the discovery of the drugs was after the oral statement and the gestures, we presumed that the statement was admitted under s. 27 of the Evidence Act 1950 as a statement leading to discovery. Before the statement and gesture, there is no evidence to indicate that the police knew where the drug was, albeit it would have been discovered eventually. Nevertheless it was discovered after the making of the statement. Therefore, we are of the view that the statement and the gesture of pointing to the refrigerator was rightly admitted.

Thirdly, the learned judge also admitted and considered other statements made by the appellant to SP7 while they were on their way to the IPD. The gist of these statements is that the appellant admitted conveying a few katis of the illegal stuff and tried to offer a bribe of RM5000 to each of the police officers in the vehicle. The learned defence counsel immediately objected to the admissibility of the statements on the ground that the statements were not made voluntarily, not that such statements were not made at all. The court then conducted a trial within a trial to consider the voluntariness and admissibility of the statements under s. 37A of the Act. It transpired during the trial within the trial that after the appellant was detained and taken to the police station SP7 administered the caution through an interpreter one Detective Corporal Ridzuan Lim @ Lim Soo Peng (SP10). On the totality of the evidence adduced at the trial within a trial, the learned judge came to the conclusion that the appellant was duly cautioned and that he understood the caution and that the statements he made during the journey was voluntary and admitted the oral statements. After scrutinising the record of the trial within a trial, we have no reason to disagree with that finding.

From the totality of the evidence adduced both by the prosecution and the defence at the trial, we are satisfied and we agree with the finding of the learned judge that there is ample evidence both direct and by necessary inferences to show that the appellant knew that the refrigerator he was conveying contained heroin. The defence has in no way rebutted the presumption of both possession and trafficking, nor has the defence raised any reasonable doubt on the prosecution's case. This case is based on the finding of facts by the trial court. We have no reason to disturb the finding of facts

by the learned judge. We are satisfied that on the evidence he was rightly convicted. We had therefore dismissed the appeal and confirmed the conviction and sentence.

Reported by Gan Peng Chiang